HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Chapter VIII Rule 32 (2) (b)
Description of the Case.

A.O. No. 423 of 2005
With
Writ Petition No. 913 of 2005

Date of Decision : 6th December, 2006

A.F.R. (Approved for reporting)
_____

~~Not approved for reporting.~~

Date : 06.12.2006 Initial of Judge.

Note : Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL, AT NAINITAL
Appeal From Order No. 423 of 2005

Bhupendra Singh Bora
S/o Netra Singh R/o Durlekh
P.O. Jaurashi, Tehsil Didihat
District – Pithoragarh ... Appellant

Versus

1. Diwan Singh Bora
   S/o Man Singh
   R/o Village Channa P.O. Jaurashi
   Tehsil Didihat,
   District – Pithoragarh

2. The United India Insurance Co. Ltd.
   Branch Office Pithoragarh ... Respondents

Shri Neeraj Upreti, learned counsel for the appellant.
Sri B.S. Adhikari, learned counsel for the respondent No.1
None for respondent No. 2.

With
Writ Petition No. 913 of 2005

Diwan Singh Bora
S/o Man Singh
R/o Village Channa P.O. Jaurashi
Tehsil Didihat,
District – Pithoragarh ... Petitioner

Versus

1. The United India Insurance Co. Ltd.
   Branch Office Pithoragarh

2. Bhupendra Singh Bora
   S/o Netra Singh R/o Durlekh
   P.O. Jaurashi, Tehsil Didihat
   District – Pithoragarh ... Respondents

Sri B.S. Adhikari, learned counsel for the petitioner
None for respondent No. 1.
Shri Neeraj Upreti, learned counsel for the respondent No. 2

JUDGMENT

Coram : Hon'ble Rajeev Gupta, C.J.
Hon'ble J.C.S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. Since both the cases are arising out of the same award and decree and common question of fact of law are involved in both the cases, as such, they are being decided by the common judgment.

2. This appeal, preferred u/s 173 of the Motor Vehicles Act, 1988, is directed against the award dated 23.06.2005 and decree dated 30.06.2005 passed by the Motor Accident Claim Tribunal/District Judge, Pithoragarh, in M.A.C. Case No. 31 of 2003 whereby the claim of the claimant was allowed for an amount of compensation to the tune of Rs. 9,500/- and the owner of the offending zeep-Diwan Singh Bora was directed to pay the same.

3. The claimant, Bhupendra Singh Bora had filed a claim petition for compensation of Rs. 3,25,000/- before the Tribunal alleging therein that on 23.09.2002 at about 6:30 p.m., while the claimant-Bhupendra Singh Bora was returning to his home in jeep bearing No. U.A.05/0609, the offending jeep being driven rashly and negligently by its driver met an accident near the village Jaurashi due to which the claimant had sustained the injuries on his left leg and other parts of the body. Thereafter, the claimant was admitted in the hospital and had incurred the expenditure of Rs. 1,00,000/- in the medical treatment. It was further alleged in the claim petition that the claimant was 20 years of age at the time of accident.

4. The owner and insurer of the Jeep contested the claim petition and denied their liability to pay the compensation to the claimant. The owner of the jeep though admitted the

facts of the accident and pleaded that the jeep was insured with the United India Insurance Company Ltd. on the date of accident, as such, the insurer is liable to pay the compensation. The insurer, on the other hand, pleaded that the jeep was being plied in breach of the policy conditions and the driver of the jeep was not holding a valid driving licence. The insurer also denied the claim petition for want of knowledge and pleaded that in absence of the material facts, proper and adequate reply is not possible.

5. On the basis of the pleadings of the parties, the learned Tribunal had framed the following issues.

i. Whether the accident in question occurred due to rash and negligent driving by the its driver on 23.10.2002, near Jaurashi, Tehsil Didihat, District Pithoragarh by Mahendra Jeep No. U.A.05/0609 in which the Bhupendra Singh has received the injuries?

ii. Whether the driver of the vehicle in question Mahendra Jeep No. UA 05/0609 has valid and effective license for driving the vehicle at the time of accident?

iii. How much compensation the claimant is entitled to get and from which opposite party?

6. After recording the evidence and hearing the parties, the learned Tribunal held in issue no. 1 that the accident occurred due to rash and negligent driving by the driver of the offending jeep. On issue no. 2, the Tribunal held that the vehicle was not driven with valid driving license by its driver. On issue no. 3, the Tribunal held that the offending jeep was being driven by the claimant himself unauthorizedly on the date of the accident as such there was contributory negligence to the extent of 50%. The Tribunal awarded Rs. 9,500/- compensation against the owner of the offending vehicle.

7. Feeling aggrieved by the judgment and award, the claimant/appellant has filed this appeal for enhancement of the compensation.

8. The respondent-Diwan Singh, the owner of the offending vehicle had also filed a writ petition bearing No. 913 of 2003 before this court on the ground that there is no provision to file appeal against any award of the claim Tribunal if the amount in dispute is less than Rs. 10,000/-. Hence the owner of the vehicle-Diwan Singh had preferred writ petition.

9. Heard Shri Neeraj Upreti, appearing on behalf of Sri G.B. Pandey, learned counsel for the appellant-Bhupendra Singh Bora and Sri B.S. Adhikari, learned counsel for the respondent No.1-Diwan Singh Bora. None is appearing for the respondent No. 2-United Indian Insurance Company Ltd. inspite of service.

10. It was contended on behalf of the learned counsel for the claimant-Bhupendra Singh Bora that the Tribunal had erred in holding that the claimant-appellant was himself driving the offending vehicle at the time of the accident, as such, he himself had contributed for this accident. It was further contended that the findings of the Tribunal is totally based on surmises and conjectures and without any evidence on record. It was further contended that the learned Tribunal had erred in holding that the driver of the offending Jeep-Bhaskar Singh was not driving the offending jeep at the time of the accident. The learned counsel for the claimant-appellant further contended that the findings of the Tribunal are self-contradictory. It was further contended that the Tribunal erred in awarding a meager amount of compensation

to the claimant-appellant and the learned Tribunal had not taken into account the medical bills filed by the claimant-appellant. It was further contended that the claimant-appellant was entitled for a sum of Rs. 3,00,000/- as compensation from the respondents. The learned counsel for the owner of the offending jeep-Diwan Singh Bora had refuted the contention. Perusal of the record reveals that the learned Tribunal had come to the conclusion that the offending vehicle was being driven by the claimant-appellant himself. The learned Tribunal further held that it was responsibility of the owner of the offending vehicle to depute or employ a qualified person having a valid driving license to drive his offending vehicle and he should not have allowed an unauthorized person to drive the vehicle. On the one hand, the learned Tribunal had held that the claimant-appellant himself was responsible for the accident and on the other hand the learned Tribunal had held that the claimant-appellant was liable for the contributory negligence to the extent of 50%. The present claim petition had been filed u/s 166 of the Motor Vehicles Act in which it is obligatory on the part of the claimant-appellant to prove the negligence on the part of the driver of the offending vehicle. If the claimant-appellant himself was negligent and he himself caused the accident then the owner of the offending vehicle and insurance company cannot be held liable at all. Thus, these two findings are self contradictory. It is also a pertinent question for adjudication whether the owner authorized the claimant-appellant to drive the offending vehicle. It is also in the evidence that Bhaskar Singh was the driver of the offending zeep. It is also pertinent question that the offending zeep was given by the driver to the claimant for driving with the knowledge of Diwan Singh-owner of the

offending vehicle. If the above questions are replied in affirmation then the question arises as to whether the owner is liable vicariously under the Motor Vehicles Act for such act of the claimant. These are the factual aspects of the case and it can be decided by the evidence of the parties. The learned Tribunal had held that the offending vehicle was being driven by the claimant-appellant himself. For the same the Tribunal had relied upon the statement of Netra Singh, father of the claimant-appellant which was given to the surveyor of the insurance company. The statement of Netra Singh had not stated that the claimant-appellant himself was driving the said vehicle. It is also pertinent to mention here that the claimant-appellant had not arrayed the driver of the offending vehicle as a party to the claim petition. The driver would have been the best person who could have deposed who was driving the offending vehicle at the time of accident. The driver had not been produced either by the claimant-appellant or by the respondents. The Tribunal had further observed that the name of the driver had not been indicated in the report which was given to the patwari. During investigation it was revealed to the patwari that the driver-Bhaskar Singh was driving the vehicle. The learned Tribunal had concluded the findings on surmises and conjectures.

11. The learned Tribunal had not further considered the evidence of Dr. H.S. Khadayat-PW3 in which he had categorically stated that there was fracture on the X-ray report on the leg of the claimant-appellant and the claimant was referred to higher institution for the operation. The said evidence had not been challenged in the cross examination. He had further admitted in his cross examination that the construction work was going on in the hospital so the

operation could not be performed in the hospital. Dr. H.S. Khadaya-PW3 had further stated that the claimant-appellant was treated outside the hospital and he appeared before him on 28.05.2004 again and it was found that he was disabled to the extent of 30% due to the weakness of the leg. This evidence has not been taken into consideration while awarding the compensation. Thus the findings of the learned Tribunal are erroneous.

12. The claimant-appellant had filed certain bills in support of his claim but those document had not been proved by the claimant-appellant. These documents cannot be read in evidence in accordance with the law. The said bills without prove are worst piece of hearsay evidence. We have also laid the guidelines for proving the documents in the judgment and order dated **30th November, 2006** passed by the Division Bench of this Court in **A.O. No. 393 of 2005, Kashmir Singh Vs. Santosh Singh Patiner.**

13. The owner of the offending jeep-Diwan Singh Bora filed the copy of the driving license as annexure-3 to the writ petition in which it has been alleged that there was an endorsement in the hill driving license in the driving license of Bhaskar Singh. The document requires verification from the Insurance company. Without being verified, it cannot be held that the alleged driver of the offending jeep-Bhaskar Singh had a valid driving license for the hill areas. This question further requires evidence.

14. It is also pertinent that the claimant-appellant has neither made the driver of the offending vehicle a party to the claim petition nor he had disclosed his name in the report

anywhere in the claim petition. The driver of the offending vehicle is a necessary party to the claim petition. We have noticed in several appeals that the claimants did not array the driver, the main 'tort feasor', as party to the claim petition. The claimant is entitled only to get the compensation u/s 166 of the Motor Vehicles Act when the driver 'tort feasor' of the vehicle was driving the vehicle rashly and negligently. The owners are vicariously liable for the acts of their servants, i.e. drivers. The master becomes liable for the conduct of the servant when the servant is proved to have acted negligently in the course of the employment. Apart this, the master is not liable under general law for as it is often said that owner of the motor does not become liable because of he is the owner of the vehicle. It is also settled position of law that before an owner liable for the tortuous act of his servant it must be established that the servant has a duty, the violation of law thereof and thus the owner is liable vicariously for the act of his servant. The master is liable for the acts of his servant and the negligence of his servant. The compensation is awarded against the owner only on the ground of vicarious liability. The Insurance Companies are liable to pay the compensation on behalf of the owner of the vehicle as they have insured the offending vehicle with them and had entered into the contract to pay the compensation. Thus the driver being the 'tort feasor' is a necessary party to the claim petition. The Motor Vehicles Act also casts a duty upon the owner or Incharge of the vehicle to furnish the information as to who was driving the vehicle at the time of the accident. If the claimant was not aware of the name of the driver, the court may insist to the owner to furnish the name of the driver to the court. We would like to direct the Tribunal to

ensure invariably in each and every case that the driver of the vehicle must be a party to the claim petition. Before framing the issues, the Tribunals would ensure invariably in every case as to whether the driver had been made a party or not. In view of the above discussion, the driver was also a necessary party to the claim petition.

15. The owner of the vehicle had filed the petition under Article 227 of the Constitution to set aside the award on the ground that the appeal was barred under the provisions of the Motor Vehicles Act as the award was less than Rs. 10,000/-. It is a settled position of law where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution. It is also settled position of law where a remedy by way of an appeal has not been provided for against the order and judgment of the District Judge, the remedy available to the aggrieved person is to file revision before the court under Section 115 of the Code of Civil Procedure. If the remedy of the revision has also been prohibited under the enactment, then only a petition under Article 227 of the Constitution would lie and not under Section 226 of the Constitution. The petitioner has filed the petition under Article 227 of the Constitution under the supervisory jurisdiction of the High Court. The jurisdiction under Article 227 of the Constitution is very limited one. The High Court while exercising the jurisdictions under Article 227 of the Constitution cannot reassess the evidence produced by the parties before the Tribunal. The High Court cannot correct the errors in its award. When the High Court exercising its jurisdiction under Article 227 of the Constitution, the court exercises the supervisory jurisdiction under the Constitution.

The High Court does not sit as an appellate court and cannot enter into the factual and legal controversy arose before the Tribunal or before the lower court. As such, the writ petition filed by the owner of the offending vehicle-Diwan Singh Bora is not maintainable. It has been held in **Ghapoo Yadav and others Vs. State of M.P.** reported in **(2003) 3 SCC p/528** as under :-

> "..... *This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of illustration, where a trial court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 CPC, in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision petition before the High Court under Section 115 CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution.*
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> *7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is*

also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision."

16. In view of the foregoing discussion, it would be just and proper to reconcile the findings and to provide the opportunity to the parties to enable them to lead the evidence on the factual aspects as indicated in the preceding paragraphs & set aside the award dated 23.06.2005 and decree dated 30.06.2005 passed by the Motor Accident Claim Tribunal/District Judge, Pithoragarh, in M.A.C. Case No. 31 of 2003. The Tribunal is further directed to decide the matter afresh after giving opportunity to both the parties to adduce the evidence. The Tribunal would also ensure that the driver of the offending jeep who was driving the offending vehicle at the time of the accident is made a party to the claim petition.

17. Accordingly, the impugned award dated 23.06.2005 and decree dated 30.06.2005 passed by the Motor Accident Claim Tribunal/District Judge, Pithoragarh, in M.A.C. Case No. 31 of 2003 are set aside. The matter is remanded back to the learned Tribunal with the direction to dispose of the claim petition in the light of the observation made above expeditiously, preferably within a period of four months from the date of receipt of the copy of the order. The amount, if any, deposited by the owner of the offending vehicle-Diwan Singh Bora before the M.A.C.T. concerned shall be adjusted at the time of final disposal of the claim petition.

18. As the award and decree has been set aside, the writ petition filed by the owner of the offending vehicle-Diwan

Singh Bora has rendered infructuous and the same is dismissed accordingly.

19. No order as to costs.

20. The Registrar General of this Court is directed to send the copy of this judgment to all the Presiding Officer of the M.A.C.T. and all the judicial officers posted in the State.

(J.C.S.Rawat, J.) **(Rajeev Gupta, C.J.)**

Dated 6th December, 2006
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